

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

LOS ANGELES HAVEN HOSPICE
INC.,

Plaintiff,

v.

KATHLEEN SEBELIUS, Secretary of
U.S. Dept. of Health and Human
Services,

Defendant.

No. CV 08-4469-GW (RZx)

STATEMENT OF REASONS AND
ORDER RE PARTIAL STAY
PENDING APPEAL

Following the issuance of the Judgment in this case, which found 42 C.F.R. § 418.309(b) to be arbitrary and capricious because it conflicted with the underlying statute (i.e., 42 U.S.C. § 1395f(i)(2)(C)) and which provided for individual and nationwide injunctive relief, Defendant Secretary of Health & Human Services applied ex parte for a partial stay of the Judgment as to all hospices other than Plaintiff Los Angeles Haven Hospice pending appeal. Plaintiff has filed an Opposition to the ex parte application. After considering the submitted papers and reviewing the materials in the case file, the Court issues the following Statement of Reasons and Order.

This Court will grant a stay as to the portion of its judgment which issued nationwide injunctive relief. This Court agrees with Plaintiff that there is no significant likelihood that the Secretary of Health and Human Services will prevail on

1 the merits of the underlying claim for reasons stated in the Court's July 13, 2009
2 ruling. See Docket Document No. 50. However, this Court is not as confident as to
3 the portion of its Judgment granting nationwide injunctive relief. There is conflicting
4 case law on whether injunctive relief (in a case where an agency's regulation is held
5 to be improper or unconstitutional) should be broad (e.g. nationwide) or more limited.
6 Compare e.g., VA Society for Human Life, Inc. v. FEC, 263 F.3d 379, 393 (4th Cir.
7 2001) (holding that issuing nationwide injunctive relief was an abuse of discretion
8 because it was broader than necessary to afford relief to the single plaintiff in the case,
9 and because such an injunction would preclude other circuits from ruling on the
10 underlying substantive issue which would "substantially thwart the development of
11 important questions of law by freezing the first final decision rendered on a particular
12 legal issue.") (quoting United States v. Mendoza, 464 U.S. 154, 160 (1984)); and
13 Bernstein v. U.S. Dept. of State, 974 F.Supp. 1288, 1309-10 (N.D. Cal. 1997); with
14 Bresgal v. Brock, 843 F.2d 1163, 1170 (9th Cir. 1987) ("[T]here is no bar against
15 class-wide, and nationwide relief in federal district or circuit court when it is
16 appropriate.").

17 The question here is whether nationwide injunctive relief is appropriate. In
18 Bresgal, it was observed that "an injunction is not necessarily made over-broad by
19 extending benefit or protection to persons other than prevailing parties in the lawsuit-
20 even if it is not a class action - *if such breadth is necessary to give prevailing parties*
21 *the relief to which they are entitled.*" 43 F.3d 1170-71. Clearly, the injunction herein
22 need not be nationwide to afford the Plaintiff complete relief.

23 It is also noted that there are at least two other non-class action lawsuits which
24 are (or had been) considering the same challenge to 42 C.F.R. § 418.309(b). See i.e.
25 Heart to Heart Hospice, Inc. v. Leavitt, No. 1:07-CV-289-M-D, 2009 U.S. Dist.
26 LEXIS 11442 (N.D. Miss. Feb. 5, 2009); and Sojourn Care, Inc. v. Leavitt, No. 07-
27 375 (N.D. Ok. 2007). Thus, there is some prospect of the issue reaching other circuit
28 courts.

1 However, this action was brought as a challenge to the regulation “on its face”
2 and not “as applied.” Thus, arguably, this is not a situation where it would “be
3 preferable to allow several courts to pass on a given . . . claim in order to gain the
4 benefit and adjudication by different courts in different factual contexts.” Califano
5 v. Yamasaki, 442 U.S. 682, 702 (1979). Further, the legal questions at issue are not
6 novel or complex, which would counsel for sculpting the injunctive relief as narrowly
7 as possible. See Bernstein, 974 F.Supp. at 1310.

8 As noted in Hilton v. Braunskill, 481 U.S. 770, 776 (1987), under Federal Rule
9 of Civil Procedure 62(c):

10 [T]he factors regulating the issuance of a stay are . . . : (1)
11 whether the stay applicant has made a strong showing that
12 he is likely to succeed on the merits; (2) whether the
13 applicant will be irreparably injured absent a stay; (3)
 whether issuance of the stay will substantially injure the
 other parties interested in the proceeding; and (4) where the
 public interest lies.

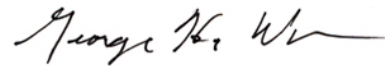
14 For the reasons stated above, this Court finds that the Secretary has made the requisite
15 showing of likelihood of success as to the issue of the nationwide scope of the
16 injunctive relief. Where, as here, the broad nature of the injunctive relief impacts the
17 operations of a federal agency across the country, both irreparable injury and public
18 interest considerations would caution for the maintenance of the status quo pending
19 appellate review. For example, as noted in paragraphs 13 and 14 of the Declaration
20 of Michelle Snyder (the acting Deputy Administrator/Deputy Chief Operating Officer
21 of the Center for Medicare & Medicaid Services, Department of Health and Human
22 Services) which is attached to the ex parte application, the current injunction would
23 significantly disrupt the Medicare program because it would inhibit the agency from
24 implementing the statutorily mandated hospice caps as to the approximate 3000
25 hospice providers during the period while a new regulation is being promulgated and
26 would concomitantly create tremendous uncertainty for the government, the Medicare
27 contractors and the hospice providers. Finally, as noted earlier in this litigation,
28 whether a given hospice provider will receive an increased or decreased level of

1 reimbursement - under a new regulation that comports with the statutory language of
2 42 U.S.C. § 1395f(i)(2)(C) versus the invalidated 42 C.F.R. § 418.309(b) - cannot be
3 ascertained without completely analyzing that provider's germane data. Thus, any
4 injury to other interested parties cannot be determined at this point.

5 For the above reasons, this Court will grant the Secretary's ex parte application
6 and stay in part the injunction issued such that it will remain enforceable only as to the
7 Plaintiff herein, but will be stayed as to the hospice providers other than Plaintiff until
8 the final disposition of the Secretary's appeal to the Ninth Circuit Court of Appeals.

9 IT IS SO ORDERED.

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11 DATED: This 11th day of September, 2009

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14 GEORGE H. WU
15 United States District Judge
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